No. 80-1625

MAY 29 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IRA L. TANNENBAUM
General Counsel
Federal Savings and Loan Insurance Corporation
Washington, D.C. 20429

ROBERT W. PATTERSON
One First National Plaza
Chicago, Illinois 60603

QUESTION PRESENTED

Whether the district court abused its discretion by enjoining the parties before it and the judges of the Illinois state court system from further interference with the district court's possession of and jurisdiction over certain real property.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Baker v. *Administrator of Backus*, 32 Ill. 79 7

Blanchard Bro. & Lane. v. *Gay Co.*, 289 Ill. 413, 124 N.E. 616 7

Donovan v. *Dallas*, 377 U.S. 408 9

Doyne v. *Saettele*, 112 F. 2d 155 7

Firebaugh v. *McGovern*, 404 Ill. 143, 88 N.E.2d 473 7

Juidice v. *Vail*, 430 U.S. 327 8

Lockport v. *Citizens for Community Action*, 430 U.S. 259 8

People v. *Weigley*, 155 Ill. 491, 40 N.E. 300 7

Steenrod v. *Gross Co.*, 334 Ill. 362, 166 N.E. 82 7

Village of Belle Terre v. *Boraas*, 416 U.S. 1 8

Younger v. *Harris*, 401 U.S. 37 8

PRECEDING PAGE WAS BLANK

Page

Statutes:

12 U.S.C. 1725(c)(4) 9
12 U.S.C. 1730(k)(1) 9
28 U.S.C. 1345 9
28 U.S.C. 2283 ..... 6, 8

Miscellaneous:

14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1976) 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1625

GRANITE INVESTMENT COMPANY, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 630 F. 2d 515. The opinion of the district court (Pet. App. C) is reported at 482 F. Supp. 77.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. A petition for rehearing was denied on December 23, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on March 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1971, the Federal Savings and Loan Insurance Corporation (FSLIC) determined that Piasa Federal Savings and Loan Association, an Illinois Savings and Loan Association, was on the verge of insolvency. FSLIC arranged a

merger of Piasa into Illini Federal Savings and Loan Association in an attempt to remedy the insolvency. To induce Illini to enter into the merger, FSLIC also executed a contribution agreement that required it either to subsidize Illini for certain losses incurred by Illini in connection with non-earning Piasa assets acquired in the merger or, at the option of FSLIC, to purchase such assets from Illini at any time for book value (Pet. App. A-3).[1]

Petitioners claim to have ownership rights in several apartment complexes encumbered by mortgages ("the Green Properties") that were part of the non-earning assets acquired by Illini as a result of the merger.[2] At the time of the merger, the loans secured by the mortgages amounted to approximately $14 million and were seriously delinquent (Pet. App. A-3).

---

[1]Because the appendix to the petition is not numbered consecutively, we shall refer to the individual appendices by their letter designations and page numbers.

[2]In the early 1960's petitioners Green and Granite and various corporations and nominees controlled by them executed several first lien mortgages in favor of Piasa in order to finance the construction of various apartment complexes located in Clinton, St. Clair and Sangamon Counties, Illinois. When financial difficulties were encountered in the completion of the complexes, the parties entered into a Base Agreement, dated August 1, 1970, in order to afford additional construction funds by restructuring the debt. Under the agreement, title to the Green properties was conveyed to respondent PSL Realty Company, a newly formed corporation wholly owned by Piasa. PSL then entered into contracts for deed to the same properties with petitioner Granite Investment Company, a limited partnership of which petitioner Green was the principal. Petitioner Granite was to manage the properties until the conditions imposed by the contracts for deed were fulfilled, at which time PSL would reconvey the properties to Granite. During that time PSL had an absolute right to all income generated by the properties. Piasa continued to hold the first lien mortgages as mortgagee. When the Granite management scheme proved unsuccessful, the merger described in the text was arranged (Pet. App. A-2 to A-3).

Illini and its subsidiary, respondent PSL Realty Co., encountered considerable difficulty in administering the delinquent loans. By March 1972 the economic situation had deteriorated to such an extent that Illini and PSL filed suit against petitioners in the Circuit Court of Madison County, Illinois, seeking an injunction requiring petitioners to turn over their books and records for inspection, to refrain from collecting further rents on the Green properties and to cease interfering with PSL's collection of the rents. A temporary restraining order to that effect was issued, and on April 28, 1972, the trial court denied petitioners' motion to dissolve the injunction. Without objection by any of the parties, FSLIC was appointed receiver of the properties (Pet. App. A-3 to A-4).

Petitioners took an interlocutory appeal from the issuance of the injunction and the appointment of the receiver. On July 23, 1976, the Illinois Appellate Court for the Fifth District dissolved the temporary injunction and the receivership on the ground that these ancillary remedies were inappropriate in the absence of pleadings seeking some form of ultimate relief. The case was remanded solely for an accounting of the income and expenses of the receivership, for a determination of the distribution of the net income, and for an award of a fee to the receiver (Pet. App. A-4, D-1 to D-18).

On August 13, 1976, PSL and Illini filed a petition for rehearing with the Appellate Court, and on August 18, 1976, FSLIC exercised its right under the contribution agreement to purchase the mortgages encumbering the receivership properties. On August 26, 1976, FSLIC filed this action in the United States District Court for the Southern District of Illinois to foreclose on the mortgages. On August 31, 1976, petitioners also applied to the Appellate Court for rehearing, specifically advising the court that

FSLIC had purchased the mortgages and was prosecuting a foreclosure action in federal court (Pet. App. A-4 to A-5).

In the interim, FSLIC had advised the district court of the receivership, its role as receiver, and the Illinois Appellate Court's disposition of the receivership. Petitioners challenged the propriety of FSLIC's purchase of the mortgages and commencement of the foreclosure action. On September 2, 1976, the district court entered an order authorizing FSLIC to remain in possession of the properties as mortgagee "operative upon the effective date of the mandate from the Illinois Appellate Court for the Fifth District dissolving FSLIC's status as receiver of the subject properties" (Pet. App. A-5). On September 13, 1976, the Illinois Appellate Court denied the petitions for rehearing without mentioning FSLIC's purchase of the mortgages or commencement of a foreclosure action. The mandate issued on October 13, 1976 (Pet. App. A-5, D-18 to D-20).

More than three years of intensive but intermittent proceedings ensued in the district court in connection with the foreclosure action. In addition, wind-up proceedings for the receivership took place in the Circuit Court of Madison County, pursuant to the mandate of the Illinois Appellate Court. On April 28, 1977, the circuit court overruled petitioners' challenges to FSLIC's conduct as receiver and entered an order approving FSLIC's final report and discharging FSLIC as receiver retroactively to September 30, 1976. Petitioners appealed to the Illinois Appellate Court from this order as well (Pet. App. A-5).

FSLIC concluded its case in the foreclosure action, and the district court denied petitioner Granite's motion for a directed verdict in that case, on November 16, 1978. Petitioners commenced presentation of their case, but during the spring of 1979 the district court recessed that trial until September 24, 1979. On September 13, 1979, however, more than three years after it first learned that FSLIC had

commenced the foreclosure action, the Illinois Appellate Court held that FSLIC had breached its fiduciary duty as receiver by acquiring the mortgages and commencing the foreclosure action. It ordered FSLIC to reconvey the mortgages to Illini, apparently intending by that order to terminate the foreclosure action (Pet. App. A-5 to A-6, E-1 to E-67).

On September 26, 1979, the district court entered an order confirming its jurisdiction over the parties and its possession of the properties, and noted that it was compelled to do whatever was necessary to protect that jurisdiction (Pet. App. A-6). On the same day, Justice Charles E. Jones of the Illinois Appellate Court entered an Order for Stay purporting to enjoin FSLIC and PSL from proceeding further with the foreclosure action in the district court. The order also declared that any attempt by FSLIC to transfer title to the properties involved in the foreclosure case would be void (*id.* at A-6, E-72 to E-81). FSLIC sought reconsideration of the order by three justices of the Illinois Appellate Court. On October 2 the Appellate Court entered a supplemental opinion in which it refused to withdraw the Order for Stay (*id.* at E-68 to E-83).

Also on October 2, 1979, the district court entered a preliminary injunction to prevent any further interference by, *inter alia*, the justices of the Illinois Appellate Court with the federal court's exclusive jurisdiction and supervision over the Green properties (Pet. App. C-1 to C-26). Following a hearing the district court entered an order on October 11, 1979, making the injunction permanent (*id.* at A-7 to A-8).

Petitioners and the Attorney General for the State of Illinois, on behalf of the justices of the Illinois Appellate Court, took an interlocutory appeal to the court of appeals. That court affirmed, concluding that the district court had

maintained exclusive possession and control over the properties and that it had not abused its discretion by entering an injunction to protect that exclusive possession (Pet. App. A-8 to A-13).

Meanwhile, FSLIC appealed to the Illinois Supreme Court from the Illinois Appellate Court's holding that FSLIC had breached its fiduciary duty and from the Appellate Court's orders purporting to enjoin the foreclosure action and to prevent transfer of title to any of the subject properties. Upon FSLIC's motion, the Illinois Supreme Court withdrew the mandate of the Illinois Appellate Court and stayed the force and effect of the lower court's orders pending disposition of FSLIC's appeal.[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, in view of the fact-bound nature of this case, the state law issues presented, concerning receivership and real property, are without general significance or application. Further review accordingly is unwarranted.

1. Once a court of competent jurisdiction has obtained exclusive possession or control of property, that possession may not be disturbed by another court. 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3631 (1976). Applying this well established principle to the unique facts of the present case, the court of appeals upheld the district court's issuance of an injunction under 28 U.S.C. 2283 to protect its jurisdiction over the Green properties.[4] That

---

[3]That appeal was submitted to the Illinois Supreme Court for decision on March 18, 1981.

[4]28 U.S.C. 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by

jurisdiction, the court of appeals found (Pet. App. A-11), had commenced on October 13, 1976, the date of the issuance of the mandate from the Illinois Appellate Court dissolving the temporary injunction. The court of appeals relied on *Doyne* v. *Saettele*, 112 F. 2d 155, 161 (8th Cir. 1940), the only federal case in point, to hold that the preexisting state court receivership, although not fully wound up at the time, constituted no bar to the district court's assumption of exclusive jurisdiction over the properties or to its taking whatever measures were necessary to protect that jurisdiction.

Petitioners focus (Pet. 14-38) their challenge to the decision below particularly upon the court of appeals' conclusion that because the state court that appointed the receiver never properly had possession of the properties, the receivership was void *ab initio*. But there is no need for this Court to review this issue of state law. In any event, it is well settled Illinois law that where the ultimate relief requested in a complaint is beyond the jurisdiction of the court, the granting of ancillary relief, such as the appointment of a receiver, is also beyond its jurisdiction and, accordingly, void *ab initio*. See *Firebaugh* v. *McGovern*, 404 Ill. 143, 150-151, 88 N.E.2d 473, 476-477 (1949); *Steenrod* v. *Gross Co.*, 334 Ill. 362, 369, 166 N.E. 82, 84 (1929); *Blanchard Bro. & Lane* v. *Gay Co.*, 289 Ill. 413, 420-421, 124 N.E. 616, 619 (1919); *People* v. *Weigley*, 155 Ill. 491, 502, 40 N.E. 300, 303 (1895); *Baker* v. *Administrator of Backus*, 32 Ill. 79, 95-96 (1863). *A fortiori*, here, where *no ultimate relief was requested*, it was beyond the circuit court's jurisdiction to appoint a receiver as ancillary relief; that appointment, accordingly, was void *ab initio*. See *Baker* v. *Administrator of Backus, supra*, 32 Ill. at 95 ("a suit must be pending * * * before a receiver will be appointed").

Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Finally, the court of appeals' conclusion that the state court receivership was void *ab initio* does not fail to accord full faith and credit to any decision of the Illinois Appellate Court, since that court never specifically ruled on the question whether the receivership was void *ab initio*.[5]

2. Petitioners also contend (Pet. 39-53) that the district court's issuance of an injunction under 28 U.S.C. 2283 violated the principles of comity and equity enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Juidice* v. *Vail*, 430 U.S. 327 (1977), because it would preclude a state court contempt proceeding that might be instituted against FSLIC in the future.

Petitioners' suggestion, however, would require an extension of the *Younger* abstention doctrine far beyond its present bounds. *Younger* forbids federal courts from enjoining *pending* state court proceedings, except in carefully limited circumstances. Conversely, the abstention principles enunciated in *Younger* and *Juidice* do not apply to an injunction issued by a federal district court *prior to* the commencement of state court proceedings. See *Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977) ("principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court"); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 3 n.1 (1974).

The injunction was entered in the present case to protect the longstanding jurisdiction of the district court, not to

---

[5]Moreover, the district court assumed jurisdiction over the Green properties in 1976, based upon the 1976 opinion of the Illinois Appellate Court, not upon what the Appellate Court was to say three years later, at a time when a protracted trial in the district court was nearing conclusion. Clearly there was no lack of full faith and credit in the district court's assumption of jurisdiction over the Green properties in 1976 after the Appellate Court had dissolved the receivership.

halt ongoing state criminal or quasi-criminal proceedings in order to permit federal review of their constitutionality. Petitioners twice have attempted to induce the Illinois courts to initiate contempt proceedings against FSLIC (Pet. 43-45). But no contempt proceeding is currently pending against FSLIC, and no such proceeding ever has been instituted by any state court involved in this litigation. Petitioners' bare hope for a contempt proceeding in the future in connection with this lawsuit provides no basis for federal court abstention on *Younger* grounds.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

IRA L. TANNENBAUM
General Counsel
Federal Savings and Loan Insurance Corporation

ROBERT W. PATTERSON
One First National Plaza
Chicago, Illinois 60603

MAY 1981

---

[6] *Younger* abstention also is inappropriate here because it would permit a state court to punish a litigant for exercising its statutory right of access to the federal courts. Petitioners' attempts to induce the Illinois state courts to initiate contempt proceedings against FSLIC are based on FSLIC's filing and continued prosecution of the foreclosure action in the district court. But FSLIC has a congressionally-granted right to bring such an action in federal court. 12 U.S.C. 1725(c)(4), 1730(k)(1); 28 U.S.C. 1345. This right cannot be taken away by the threat of contempt. See *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964).